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BY HAND DELIVERY

Kristi Izzo, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Re: In the Matter of Basic Generation Service for Year Three of the Post-Transition Period
and
In the Matter of the Ownership of Renewable Energy Certificates ("RECs") Under the Electric Discount and Energy Competition Act, as it Pertains to Non-Utility Generators and the Board's Renewable Energy Portfolio Standards
Docket Nos. EO04040288 and EX04080879

Dear Secretary Izzo:

This letter (original and 11 copies) is submitted on behalf of Jersey Central Power & Light Company ("JCP&L" or the "Company") in lieu of more formal Reply Comments pursuant to the Order ("REC Order") of the Board of Public Utilities ("Board"), dated August 27, 2004, in the above-referenced dockets. In the REC Order, the Board granted a motion to sever issues concerning rights to renewable energy certificates ("RECs") from the broader proceeding involving determinations as to the provision of basic generation service ("BGS") for Year Three of the Post-Transition Period.

The motion to sever was filed by Public Service Electric and Gas Company, JCP&L, Atlantic City Electric Company d/b/a Conectiv Power Delivery and Rockland Electric Company (collectively, the "EDCs") in response to a Notice of Appearance and Proposal in Docket No. EO04040288 ("Proposal") filed by Wheelabrator Falls Inc. and Wheelabrator Gloucester L.P. (collectively, "Wheelabrator"). Wheelabrator had argued in its Proposal, among other things, that the Public Utility Regulatory Policies Act of 1978 ("PURPA") preempts the Board from addressing issues concerning rights to RECs and that the Order Granting Petition for Declaratory Order of the Federal Energy Regulatory Commission ("FERC"), dated October 1, 2003, in American Ref-Fuel Company, et al., FERC Docket No. EL03-133-000, 105 FERC ¶61,004 ("Initial FERC Order"),[1] conclusively determined that RECs were not conveyed to purchasing utilities under PURPA power purchase agreements ("PPAs") entered into between non-utility generator ("NUG") qualifying facilities ("QFs") and purchasing utilities. Under Wheelabrator's theory, which JCP&L rejects, the RECs, therefore, remained the property of the selling NUGs.

Introduction

In its initial comments in this matter, dated September 22, 2004 ("JCP&L Initial Comments", which are incorporated herein by reference), the Company argued that the very decisions on which Wheelabrator relies -- the Initial FERC Order and the FERC Rehearing Order -- by their explicit terms make clear that PURPA has not preempted State jurisdiction with respect to issues surrounding RECs. For example, in the Initial FERC Order, FERC explicitly recognizes that "RECs are created by the States" and, therefore, "exist outside the confines of PURPA" (Initial FERC Order, at ¶23). Further, according to FERC, the States "have the power to determine who owns the REC in the initial instance, and how they may be sold or traded" because "it is not an issue controlled by PURPA" (ibid.). FERC further held that, notwithstanding FERC's purely PURPA-based decision in the Initial FERC Order, "State law

[1] FERC denied a motion for rehearing of the Initial FERC Order in its Order Denying Rehearing, dated April 15, 2004, FERC Docket No. EL03-133-001, 107 FERC ¶61,016 ("FERC Rehearing Order"). An appeal from this decision is pending in the U.S. Court of Appeals, D.C. Circuit (Case No. 04-1182).

[could] provide to the contrary" (FERC Rehearing Order, at n.1) and "insofar as RECs are State-created, different States can treat RECs differently" (id., at n.4), thus acknowledging that uniform treatment across the States -- a prerequisite for a finding of preemption -- is not required.

Thus, the State, and, in particular, the Board, has clear authority to address REC issues. As argued in the JCP&L Initial Comments, the Board should exercise this authority in creating and defining RECs in order to provide that the RECs from existing PPAs between NUG QFs and utilities should be made available to winning BGS suppliers or the purchasing utility, so as ultimately to benefit the customers who pay for the power[2], whether or not the Board chooses to address the subsidiary issue of "ownership" of the RECs. The JCP&L Initial Comments also set forth policy considerations that warrant such action (see JCP&L Initial Comments, at 8-12), while recognizing that a distinction could reasonably be made between pre-existing PPAs and "new" PPAs on this score (id., at 11-12).

Rather than repeating the points made in the JCP&L Initial Comments at length here, the Company will, instead, respond briefly to those initial comments that argued for a contrary conclusion, as submitted by Wheelabrator, Integrated Waste Services Association ("IWSA"), Independent Energy Producers of New Jersey ("IEPNJ"), Covanta Energy ("Covanta"), The

[2] As noted in the JCP&L Initial Comments (at n.4), if the purchasing utility is entitled to the environmental attributes, then, to the extent the utility is able to sell them rather than providing them to winning BGS suppliers, the proceeds could be credited to customers.

Pollution Control Financing Authority of Camden County ("PCFACC") and American Ref-Fuel Company ("Ref-Fuel") (collectively, the "Opposing Comments").[3]

Reply

There are several general overriding themes set forth in one or more of the Opposing Comments: (1) an attempt to frame the issue as one of contract interpretation or a determination of "ownership" interests in the environmental attributes, asserting that a failure to adopt the position of the Opposing Comments is somehow akin to an expropriation of the NUG's alleged property rights in RECs; (2) an assertion that continuation of the current policy of making the environmental attributes from existing PPAs available to winning BGS suppliers will discourage development of renewable generating facilities; (3) an assertion that continuation of the current policy is anti-competitive; and (4) an assertion that allowing NUG QFs to separately benefit from these environmental attributes will serve to ameliorate local taxes. Each of these themes are discussed in turn below.

(1) Framing the Issue

As explained in detail in the JCP&L Initial Comments, JCP&L does not believe that any decision as to contract interpretation is required at all.[4] Nor do the NUGs have any property

[3] Each of the other EDCs, the Division of the Ratepayer Advocate and J. Aron & Company submitted comments supporting conclusions that are consistent with JCP&L's position.

[4] Were this issue ripe for a contract interpretation decision, JCP&L believes that the agency making that interpretation, whether the Board or a court, should find that the RECs have been conveyed to the purchasing utility. The primary support for such an interpretation of the contractual language of the PPAs rests on certain of the considerations discussed under "Policy Considerations" in the JCP&L Initial Comments and the fact that the PPAs, in general, provide for the sale of the entire electrical output of a facility, thereby encompassing all aspects and attributes of that output. However, as noted in the text, such a contractual interpretation is not

right in or to RECs, as no State, including New Jersey, was (or is) under any obligation ever to create or recognize a REC.[5] Indeed, but for the Board's recent action in amending the Renewable Portfolio Standards ("RPS"), N.J.A.C. 14:4-8.1 et seq., effective April 19, 2004 (see 35 N.J.R. 4445(a), 36 N.J.R. 2053(b)), as authorized by Section 38 of the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-87(d), any questions about RECs in New Jersey would not even arise.

As FERC itself has recognized, RECs are creatures of State law. Therefore, the States, and more specifically the Board, can define these creatures of State law as it deems most beneficial to the State and the public interest. JCP&L submits that the public interest is best served by creating and defining RECs in such a manner as to provide that the environmental attributes from existing PPAs between NUG QFs and utilities will be made available to winning BGS suppliers or the purchasing utility, so as ultimately to benefit the customers who pay for the power. Not only has the Board already made distinctions of this sort in the RPS (see JCP&L Initial Comments, at 6-7), but the New York Public Service Commission also recently issued an order regarding renewable portfolio standards that, with very few exceptions, limit eligibility to renewable facilities constructed after January 1, 2003 (Order Regarding Retail Renewable Portfolio Standard, Case 03-E-0188 (September 24, 2004)). Thus, fine-tuning these State-created and State-defined attributes in a way designed to achieve specific public policy goals is a

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necessary because the Board can, and should, define RECs in such a way as to serve the public interest and obviate the need for any contract interpretation.

[5] Even today, New Jersey remains dependent on PJM to create an appropriate REC tracking and trading mechanism.

common and accepted practice. There is no need either to interpret the PPAs or to wrestle with abstract issues of "ownership".

(2) Discouraging Development

The Opposing Comments, to one degree or another, also attempt to suggest that a refusal to allow the NUGs to realize an additional, unbargained-for windfall from RECs will somehow discourage development of renewable generating facilities. The facilities that are subject to existing PPAs, on which the JCP&L Initial Comments focus, have already been built, so further incentives with respect to these facilities are not needed. On the other hand, the JCP&L Initial Comments have already recognized that "new" facilities that are not already subject to PPAs could be dealt with differently, which could allow for REC-based incentives to encourage development of new facilities if it is determined that such incentives are warranted.

(3) Anti-Competitive Impacts

IEPNJ (at 4), Covanta (at 4) and PCFACC (at 8), in particular, argue that allowing the NUG QFs to realize an additional, unbargained-for windfall from RECs, and depriving winning BGS suppliers and/or the purchasing utilities of these benefits, would foster a competitive market by placing BGS suppliers and third party suppliers on a more even footing. Whether or not this assertion may be accurate, the Board has already taken actions designed to foster (and, indeed, subsidize) competition in the areas it deems appropriate through imposition of a retail adder applicable to most larger customers. No further subsidization is warranted for these customers. More significantly, the Board has also already determined that it is not in the public interest to impose additional costs on smaller customers, including, in particular, residential customers, who do not yet have any meaningful choice anyway. Reserving the benefit of these environmental attributes to the NUG QFs would have precisely that impact.

(4) Impact on Taxes

Covanta (at 4) and PCFAAC (at 3-4), in particular, argue that the additional revenues that would be enjoyed by NUG QFs, at least those that are waste-to-energy facilities, would result in lower taxes, primarily in Warren County in the case of Covanta (Covanta Comments, at 4) and Camden County in the case of PCFAAC (PCFAAC Comments, at 1). Even if this assertion is accurate, it does not justify granting such a windfall to these QFs. All of JCP&L's customers pay the full avoided cost for the power generated by these facilities, and all such customers should benefit from these attributes, for which they are paying. There is no reason to favor residents of particular localities, indirectly, through tax offsets. Uniform treatment of all customers will be realized by making these attributes available to winning BGS suppliers or the purchasing utility.

Certain specific statements made in certain of the Opposing Comments are addressed below:

Wheelabrator:

Wheelabrator argues (Wheelabrator Comments, Point 2[6]) that a failure to allow the NUGs to realize an additional, unbargained-for windfall from RECs would somehow constitute a reconsideration, reopening, reinterpretation or modification of the existing PPAs or would otherwise contravene the prohibition on "utility-type" regulation of QFs contained in Section 210(e) of PURPA, as interpreted in Freehold Cogeneration Associates, L.P. v. Board of

[6] The version of the Wheelabrator Comments received by JCP&L did not have page numbers.

Regulatory Commissioners of New Jersey, 44 F.3d 1178 (3rd Cir.), cert. den.. 516 U.S. 815 (1995).[7] As already noted in the JCP&L Initial Comments (at 4), by defining which attributes qualify as RECs (as discussed above and under "Board or Court Jurisdiction" in the JCP&L Initial Comments), the Board is not reconsidering, reopening, reinterpreting or modifying these existing PURPA PPAs, contrary to the implications of Wheelabrator. Instead, the Board is simply applying its State-created REC program to the existing PPAs. But the EDC obligations under the PPAs will remain unchanged, as the EDCs will continue to pay the same price that was originally bargained for and approved by the Board. Moreover, such action by the Board will in no way constitute regulation "respecting the rates, or respecting the financial or organizational regulation, of electric utilities", which is the "utility-type" regulation prohibited by Section 210(e) of PURPA.[8]

Wheelabrator's further argument that the EDCs have somehow already "separately transferred" the RECs from these facilities (Wheelabrator Comments, Point 1.B) is not only irrelevant to the issue at hand -- the Board's authority to define RECs for use in New Jersey in such manner as it deems most beneficial to the public interest -- but is also factually erroneous. All that the Board authorized in its Decision and Order, dated January 29, 2004, in Docket No. EO03050394 was that BGS suppliers should be treated, solely for RPS compliance purposes, as if they had an equivalent level of RECs as might otherwise be available to them from the NUG

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[7] Somewhat similar arguments, but in this case based on EDECA's asserted prohibition on "altering" NUG PPAs, are advanced by PCFACC (at 6-7), and, for the reasons discussed in the text, are equally unfounded.

[8] Nor would such action result in an "involuntary transfer" of RECs from Wheelabrator's facilities, because, by definition, there would be no RECs associated with those facilities that could be used to meet New Jersey's RPS requirements.

QFs. The Board did not authorize, and the EDCs did not effect, a "transfer" of RECs or any equivalent right to the winning BGS suppliers. In fact, there is no question that the winning BGS suppliers could not sell any of these RECs or other rights to third parties if they could not avail themselves of such rights for their own RPS compliance purposes.

Finally, with respect to the Wheelabrator Comments, the Company notes that the assertion that JCP&L has "transferred [its] power sales contract entitlement to unregulated affiliates or other third party IPPs" (ibid.) is simply not accurate.[9]

IWSA:

Aside from asserting that there is a need for incentives for the development of renewable facilities, which, as discussed above, are unnecessary for existing facilities with existing PPAs and can be created for new facilities (if deemed appropriate), IWSA's principal point seems to be that the failure to allow the NUGs to realize an additional, unbargained-for windfall from RECs somehow causes the pre-existing PPA price to no longer constitute the utility's relevant avoided cost under PURPA (ISWA Comments, at 2-3). The logic of the argument is obtuse, at best. The existing PPAs were approved as being in compliance with PURPA's avoided cost requirements, and that avoided cost was "locked in" for the life of the PPAs, as presumably required by PURPA. The fact that many years later, some States, including New Jersey, have determined for wholly unrelated reasons to institute RPS and associated REC programs in no way retroactively

[9] Wheelabrator's suggestion (Wheelabrator Comments, at n.18) that there is something inappropriate about an EDC employee communicating with a Wheelabrator representative, rather than counsel for Wheelabrator (who would be unknown to the EDC employee), about the need for routine documentation called for by the RPS is totally without merit. Is the suggestion now that any routine business communication is supposed to be routed through attorneys, or was the NUG employee supposed to be able to anticipate that Wheelabrator would decide, after-the-fact, to make a "legal" issue out of so-called REC entitlements?

transforms what was the appropriate avoided cost into something that no longer qualifies as avoided cost. As ISWA itself recognizes, avoided cost "does not change according to the source of the capacity and energy" (ISWA Comments, at 3). Even more so, it does not change retroactively because of subsequent, unrelated regulatory actions.

Others:

The arguments included in the IEPNJ, Covanta, PCFAAC and Ref-Fuel Comments largely cover the general overriding themes outlined above or otherwise overlap those presented by Wheelabrator and ISWA. Therefore, they have been addressed above.

Conclusion

This proceeding is not necessarily about contract interpretation at all. Rather, the issue confronted by the Board is one over which it has exclusive jurisdiction -- the creation and definition of RECs. Thus, the State, and, in particular, the Board, has clear authority to address REC issues and the Board should exercise this authority in creating and defining RECs in order to provide that the environmental attributes from existing PPAs between NUG QFs and utilities should be made available to winning BGS suppliers or the purchasing utility, so as ultimately to benefit the customers who pay for the power.

Respectfully submitted,

Marc B. Lasky

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cc: (By Regular U.S. Mail)
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SERVICE LIST

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